CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

JUNE TERM, 1832.

ALLEN MOBLEY *v.* LEWIS RUNNELLS *et al. admrs. of* DELILA BUTLER.

Where the plaintiff bailed a slave, and after the death of the bailee his executors continued in possession, it was held, *per* HENDERSON, Chief-Justice, and HALL, Judge, that although the plaintiff might declare against the executors as executors, for a detention after the death of the testator, yet as the testator's interest had determined, there was no proof to support the declaration. In the same case, held by RUFFIN, Judge, that *detinue* will not lie against an executor for a detention after the death of the testator.

DETINUE for a slave. No declaration was filed.

Pleas—general issue and the statute of limitations.

On the trial before his Honor Judge MARTIN, at Sampson, on the Fall Circuit of 1830, the plaintiff offered in evidence a bill of sale from the defendants' intestate to her daughter, who afterwards intermarried with one *Burton*, by whom the slave was conveyed to the plaintiff. It was proved that the slave remained with the defendants' intestate, by consent of the plaintiff, until her death, and afterwards came into the possession of the defendants, her administrators.

The defendants offered evidence that their intestate was entitled to a life estate only in the slave, under a decree of the County Court of Sampson.

Under the directions of his Honor a verdict was returned for the plaintiff, and the defendants appealed.

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No counsel appeared for either party.

HENDERSON, Chief Justice.—I will not in this case discuss the question, upon which there is a difference of opinion in the court, whether an action of *detinue*, such as the present is, can be sustained against administrators, as administrators, for a detention by them. The question in principle is fully discussed in *Eure* v. *Eure*, (*ante* 206,) to which I refer; only observing that administrators may settle an account, may indorse a bill, receive a bill, and promise as administrators. And I can see no reason, why they should not detain property in the same capacity; and that it would be unjust in the highest degree to throw upon them the responsibility of reconsidering at their peril a question which has been already determined, by their intestate. If there be error in the decision, it should fall on him who made it; that is, in such case on the estate, and not on them, who, as it were, acted in obedience to the intestate's orders, as his agents. Nor do I think the argument by any means conclusive, that their letters give them authority to take into their possession what is of the estate of their intestate only, and not the property of another. Such rigid construction is not compatible with our nature. For the most astute of us are not gifted with the power of determining, with absolute certainty, one half, nay one tenth of the questions on which we must decide, if we act at all. And without any great violation of the common intendment of such a phrase, it may well be taken to mean, such goods as were *understood* to be of the estate of the intestate. And where his estate is to be the gainer or the loser, the understanding of no one can be so well referred to by the administrator, as that of the intestate himself. And further an estate means interest; and although we have not in personals the same divisions of estates or interests as in lands, to wit, the possession in one, and the right of possession in another, and the mere right or title in a third, yet we have something analogous thereto, as possession gives right, against all but the rightful owner, or against one whose pre-

sumption of rightful ownership is better than the possession. A bailee must deliver possession to his bailor, although he may not be the rightful owner; recognizing very clearly a presumptive estate or interest, arising from possession. And these words may well justify, nay, direct the administrator to take into his possession, as administrator, all the goods of which the intestate died possessed. For thereby he was presumptive owner. I am speaking now of the construction of those words, as between those interested in the fund and the administrators; not as between the adminstrators and mere strangers; for as to them the administrators certainly act at their peril. No authority derived from their intestate can justify them in taking the property of another. They are, if he chooses to consider them so, mere wrongdoers, and individually liable: but he may, if he pleases, consider them as acting in obedience to the directions virtually given to them by their intestate. I have endeavored to show, that those interested in the fund have no right to complain, if they are charged as administrators. For it is to guard their interest, that the opposite rule is endeavored to be supported, to prevent the wrongful acts of the administrators or executors to be thrown upon the assets. I will therefore consider the declaration as having two counts, one for the detention of the intestate, and one for their own detention as administrators.

I think the evidence supports neither count; not that for the detention of the intestate; for it appears from the plaintiff's own evidence, introduced, I suppose, to repel the plea of the statute of limitations, that the intestate held the slaves, by consent of the plaintiff. Her detention therefore could be no wrong to the plaintiffs. The proofs not only do not support the first count, but disprove it. As to the latter count the proof is, that at the time of her death the intestate set up no title in herself, but that she held possession at the will of the plaintiff; and the defendants show, that she had at most but a life estate. Take it therefore either way, this action cannot be supported. For to support the latter count, it must be shown that the possession was in the repre-

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sentative character; that is, but in affirmance and continuance of the claim set up by the intestate. If the intestate held but for life, a detention by the administrators afterwards could not be thrown on the assets. It would be no violation of duty in them *to surrender up the possession immediately.*

Although the bailee is not permitted to dispute the title of the bailor, yet if the latter by his own showing has none, he cannot recover.

I confess I should have some doubts as to the obligation of the administrators, as such, to surrender up the property to the bailor, if the plaintiffs had relied upon their bailment alone. But they have exposed their title, and shown, that making the most of it, it expired with the life of the defendants' intestate, from whom they derived it. I think this discharges the obligation, which the bailee is under, to restore the property bailed at the expiration of the bailment; which is founded on the presumption, that the bailor has the property—a presumption which, in ordinary cases, the law will not permit the bailee to controvert by proofs. But when the bailor himself exposes his want of title, the court will not decree the possession to be changed.

If any interest, however small, passes by a deed, it creates no estoppel.

As to the question of estoppel, arising from the bill of sale to the daughter, under whom the plaintiff claims, disposing of the whole interest in the slave, there is nothing. Estoppels are not to be favored, at least such as arise from the act of the parties. They exclude the truth, and are admitted only for the sake of repose. But there is no estoppel in this case, because some interest passed by the deed, to wit, the life estate. And the same deed never passes an interest, however small, and also creates an estoppel. The reason is not very satisfactory, but the law is certainly so. (*Co. Litt. passim on Estoppel.*) Put the strongest case. Son, tenant *per auter vie;* reversion in the father. The son makes a feoffment in fee. The *cestui que vie* and the father die; the reversion descends on the son, as heir to the father. The son may recover against his own feoffee; and the reason given, why he is not estopped by his feoffment in fee, is that something (his estate *per auter vie)* passed to the feoffee. But if a son having no interest had made a feoffment, he would have been estopped. So here, the intestate; but having an interest, she is not.

I will here add an additional reason, why the action of detinue ought to lie against executors or administrators, as such, for a detention in their representative character. The executor may be a poor, but an honest man. The estate may be rich. The owner may prefer onerating the assets to a judgment against an insolvent executor, who will not but by the direction of the court touch the assets, to pay a judgment recovered against him individually. Although I have no doubt, that in such case, if the executor did pay out of the assets he would be protected. But I doubt whether the claimant, after he has chosen to sue him in his individual character, could recover against him as administrator. It is right therefore for the creditor to onerate the assets, if the facts will warrant him.

RUFFIN, Judge.—I think the action of *detinue* will not lie against the defendants, in their representative character, for a detention commenced by them after the death of their intestate. The act is a wrong by them personally. It cannot affect the estate, but charges the defendants in their own right. The letters of administration go only to the goods of the intestate, and do not justify or excuse the administrator in taking the goods of another, under pretence that they belonged to the intestate. It is like a sheriff seizing under a *fi. fa.* against one, the property of another. The action is not brought against him as officer; but personally, because the act was beyond his duty or authority, and he is a trespasser.

I do not mean to say that *detinue* will not lie against executors. But it must be on the testator's detention. If it were otherwise, a charge might be thrown on the assets at the mere will of the plaintiff, without any wrong by the testator, but upon that of the executor acting beyond his rights. Nor do I mean to say, that where the executor has detained the property honestly, upon a fair claim of right in his testator, and defended *bona fide* by himself, he shall not be indemnified for the costs out of the assets, as between him and the legatees. That is a different question. But this I mean to say: that for a mat-

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ter arising *wholly* in the executor's time, no action against him as executor will lie. The contract or wrong is altogether the executor's own.

For the same reasons, I think, counts on the detention of the testator and executor cannot be joined. (*Jennings* v. *Newman*, 4 *T. R.* 347. *Bridgen* v. *Parks*, 2 *Bos. & Pul.* 424.)

But if they can, surely it must appear, that the testator did set up a right in himself, and that the executor took the possession again, claiming upon that right. Nothing less than that would be allowed by the most liberal confounder of actions.

Here the plaintiff himself shows, that the intestate had the possession by his leave during her life. Such evidence was indispensable to prevent the bar of the statute of limitations. The wrong therefore commenced in the defendants' own time, and upon a right or pretended right, distinct from their intestate's.

The evidence given did not support the action, if it be founded on the detention of the intestate. If the detention be that of the defendants alone, they cannot be declared against as administrators. And if there be two counts, one on detention by each, I think the declaration would be bad, because they cannot be joined. But if they can, the evidence here goes altogether to a detention of the defendants, upon a right and claim different from those of the intestate. Wherefore, my opinion is for a new trial.

PER CURIAM.—JUDGMENT REVERSED.

DANIEL COLTRAINE v. HUGH McCAIN.

Trespass will lie against a deputy clerk for wrongfully issuing an execution, under which the plaintiff's property was sold.

The cases of *Taggert* v. *Hill*, (2 *Hay.* 86.) and *Wingate* v. *Galloway*, (3 *Hawks*, 6,) approved by RUFFIN, Judge.

TRESPASS VI ET ARMIS, tried before his Honor Judge NORWOOD, at Randolph, on the fall circuit of 1829.

Upon the plea of *not guilty*, the case was, that the plaintiff, as administrator of one *William Coltraine*, brought an action in the County Court of Randolph, against one *John Ramsour*, on a bond made payable to his intestate, in which judgment was rendered in favor of *Ramsour*. The defendant, who was deputy clerk of Randolph County Court, issued an execution against "the goods "and chattels, lands and tenements of *Daniel Coltraine* "administrator of *William Coltraine*," for all the costs which had accrued in the cause, as well the plaintiff's as the defendant's. This execution was levied by the sheriff upon a horse, the property of the plaintiff, which was afterwards sold, and the proceeds applied to the satisfaction of the execution. The jury, under the directions of his Honor, returned a verdict for the plaintiff, from which the defendant appealed.

Winston, for the defendant.

No counsel appeared for the plaintiff.

RUFFIN, Judge.—This case was very fully and ably argued for the defendant; and the court has taken time to look into all the authorities cited. The points were deemed well worthy of consideration; but after reflection, none of them seem to be well founded.

The first is, that for no act done by *color* of office, and in the course of its duties, will an action lie against the deputy, but only against the principal. This position is rather inaccurately stated; and when divested of its inaccuracy, is answered by the very stating of it. If an act be done *in the course of the duties of an office*, it must be properly an official act; and no action lies therefor, against either a principal or deputy. But the question is, whether for an act, which neither principal nor deputy hath authority to do, and which is altogether unlawful, the action must be against the former. The court thinks not. The distinction is, where the cause of complaint is for nonfeasance or misfeasance. The law does not impose any duty on a deputy as such; does not recognise him as an officer within himself. For omissions to act therefore, he is not responsible; for he is not bound

The principal only is liable for the mere nonfeasance of his deputy.

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to act. Whenever the plaintiff must state the official character of the party sued, as one of the allegations on which the defendant's liability depends, the principal alone is responsible. But where the *corpus delicti* is a thing of active wrong, and a trespass *per se*, unless justified, then the hand that does or procures the act is liable. True it is, the principal is also liable; for to all civil purposes, the act of the deputy, by color of the principal's authority, is that of the principal himself; who must take care to employ no person who will abuse his authority. But in this last case the principal is not alone liable. The deputy is also; because he is not justified by any authority in himself or his principal. Where the principal is sued for the tortious act of the deputy, the plaintiff must indeed show the connexion between them, and therefore the official character of the defendant, because upon that character the connexion depends, and upon that again the responsibility of the defendant for the act of the deputy. But where the deputy himself is sued, the plaintiff is under no necessity of showing more than the act of trespass; which constitutes a complete case, unless the defendant shows a lawful authority. This lawful authority does not consist in a deputation to do the duties of an office; but in that and the further fact, that the act done was a duty of office: that the officer himself could do it, and consequently, that the deputy could also. But if it be an act which is *per se* a trespass, and an authority to the principal be not shown, by parity, none existed in the deputy. A *fi. fa.* against A does not justify the seizing of the goods of B, and trespass lies against the sheriff, if *he* does it. So it lies against the sheriff, if his *deputy* does it. But in the last case, it lies also against the deputy himself; because he did the fact which was unlawful, and not justified. But if the action has been by the plaintiff in the *fi. fa.* for not seizing the goods of A, the sheriff alone could be sued; because the law does not make it the *duty* of the deputy, as such, to make the money, but only that of the sheriff, that he should do it, or cause it to be done. This reconciles all the cases cited. *Saun-*

But for an unlawful act committed by the deputy *colore officii*, both are liable.

derson v. *Baker*, (3 *Wils.* 309.) *Ackworth* v. *Kempe*, (*Douglas* 40,) and *Woodgate* v. *Knatchbull*, (2 *T. R.* 148,) were actions against the sheriff for the misconduct of his officer; in which it was contended, that the principal was not liable, because the deputy was for going beyond his duty. It was held, that the principal was liable; not because the deputy was not, but because, although he was, the principal was also, otherwise the principal might put any body, however worthless or insolvent, under him, and so the public would have no security. But where, as in *Cameron* v *Reynolds*, (*Cowper* 403,) the *gravamen* is, that the deputy *did not act*, that is, make a bill of sale to the purchaser of goods bought under execution, the plaintiff could sue the sheriff alone. So here, if the action was for refusing to issue a proper execution, the clerk would be the person. But where it is for seizing the plaintiff's property, by virtue of a void execution issued unlawfully by himself, the trespass, the active unlawful act is not purged by the delegated authority; for the same authority would not justify the principal himself. The opinion of the court therefore is, that the action well lies, if the execution was void.

An execution *de bonis propriis*, where the judgment affects the assets only, is void.

As to that; an execution without any judgment is certainly void. One not conformable to, and warranted by a judgment stands on the same footing. I need not cite an authority for this, besides the one, adduced for the defendant, of *Barker* v. *Braham et al.* (3 *Wils.* 268;) which by the way is strong to the first point; for it was trespass *against the attorney*, as well as the plaintiff, for suing out a void *ca. sa.* That was a *ca. sa.* under which an administratrix was arrested on a judgment *de bonis intestati;* and it was held, that *trespass vi et armis* lay against the plaintiff and the attorney both. But it is said, that this execution is good for part; since the executors were liable for their own costs, and therefore, that the taking is justified. The consequence would follow, if the premises were correct. The executors are liable for their own costs; and if the process had distinguished their costs from the defendant's in the suit, so as to show the defendant in the execution how much he must rightfully

And the fact, that the costs for which the administrator was liable were included in the execution, does not render it valid.

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pay, this argument would have been sound. It would have then been the party's own fault, if he had suffered his property to be seized for the payment of a sum to which it was liable. But when the clerk mixes lawful and unlawful demands in a process, which from its nature compels the sheriff to levy the false as well as the true demand, and puts it out of the power of the party himself to discriminate the demand of one sort from the other, he is a trespasser *ab initio*. It is an abuse of the authority to levy a certain sum, to use it as the means of levying a larger sum; especially under such circumstances, as prevent the debtor from avoiding a seizure by payment of the true debt. It comes within the reason and the rule of the *Six Carpenters'* case. (8 *Rep.* 146.) Consistent with this are the cases of *Taggert* v. *Hill*, (2 *Hay. Rep.* 86.) and *Wingate* v. *Galloway*, (3 *Hawks* 6). The execution was for the true debt, and the defect was, that it did not properly set out the items of costs. The sheriff knew precisely how much in law he ought to raise, and for that the process was good. But here the execution is for the whole sum, as costs adjudged to the defendant in the action.

It is however said, that this execution justifies, until it be set aside; for the writ may be amended, and then contrary proceedings will be going on together. True; a writ may be superseded at the instance of one party, or amended at that of the other, as the interests of one or the other may induce him to move in it. And this plaintiff might well have asked the court to set aside the execution before action brought, for fear the amendment might be allowed pending his action, and so defeat him. But there is no necessity for such a motion in the first instance, if the writ in its present state will not justify. The plaintiff proceeds at his risk, and if he chooses to suppose, as well he may, that the court will not allow the amendment against the justice of the case, or only upon such terms as will promote justice between the parties, there is nothing to prevent his treating a *void* process as void, before the court pronounces it so. If this were not so, where is the necessity to amend in any case.

The amendment is asked for the sake of putting the process into a shape to justify. If it justified before, no amendment would be necessary; and all these questions would have come on in the shape of motions to set aside. Yet it is not so. *Brown* v. *Hammond* (*Barnes' Notes* 10,) was a *ca. sa.* against the defendant by a wrong christian name. The court permitted the plaintiff to amend. Why? Because without, the person arrested would have had his action. So *Laroche* v. *Washborough et al.* (2 *T. R.* 737,) was a *ca. sa.* against two on a judgment in King's Bench for that debt and costs, and also the costs in the Exchequer Chamber of a writ of error sued out by one. There were counter motions; by the defendant, to be discharged out of execution; not to set aside the execution; by the plaintiff to amend, so as to make his arrest lawful by relation, and authorize his future detention. The amendment was allowed, and *Buller*, J. expressly says, that in *Brown* v. *Hammond*, the plaintiff would have been liable for false imprisonment if the amendment had not been allowed; tho' the sheriff would have been justified. The execution, says he, was not warranted by any judgment; but the court said they would make it correspond with the true judgment. Until it was thus made to correspond, it was a nullity. The case from New-York, (*Bissell* v. *Kip*, 5 *Johns.* 89,) only decides that the sheriff, in an action for an escape, cannot take advantage of the variance between the judgment and *ca. sa*; because the writ justified him, and he had recognized and acted on it, and could not then collaterally make the objection.

HENDERSON, Chief-Justice, concurred.

HALL, Judge, *dissentiente*.—But few cases are to be found in point to govern the present question. It must therefore be decided upon general principles, and its analogy to other cases.

It was decided by three judges against the opinion of *Lord Holt*, that an action would not lie against the postmaster general, for the loss of a letter covering exchequer bills, delivered at a post office to his deputy. It

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was said that it was not like the case of common law officers, where the superior answers for the inferior. That every post-master in his office was as much an officer as the post-master general. (*Lane* v. *Cotton*, 12 *Mod.* 477.) That an action lies against a deputy post-master for not delivering letters, and in other respects neglecting his duty, because they are subsisting substantial officers, and answerable for their own misfeasances. That the general post office is the centre of a large circle; that the deputies' offices are the centres of smaller circles, but they fill up the larger, and extend over the country; and that on account of their distance, they are not within the control of the post-master general. (*Rowning* v. *Goodchild*, 3 *Wils.* 443.) But this reasoning does not seem to be applicable to sheriffs' officers.

It may be laid down as a general position, that the sheriff is liable for the misconduct of his deputies, unless where they act criminally. (*Sanderson* v. *Baker*, 2 *Bl. Rep.* 832. *Ackworth* v. *Kempe*, *Doug.* 40. *Woodgate* v. *Knatchbull*, 2 *T. R.* 148.) The duties of a sheriff are confined to a single county. Those of the post-master extend over the whole country. With as much, if not greater force, do these principles apply to clerks and their deputies. The duties of sheriffs are limited to the boundaries of the counties in which they act; those of a clerk may be confined within the walls of his office.

Admitting that an action will lie against the principal, for *an official act done by the deputy*, the next question is, will such action lie against the deputy? It may be admitted here, that in some cases an action will lie against either. As where the sheriff's deputy took the goods of a stranger instead of the goods of the defendant, under a *fieri facias*, in such case an action would lie against the deputy as well as the sheriff. But the taking of the goods in such case was not an *official act*. Any person might do it as well as the deputy sheriff. (*Saunderson* v. *Martin*, 3 *Wils.* 509. *Ackworth* v. *Kempe*.) Such a case can have no influence upon the question, whether the deputy is liable to the party injured for an improper official act, or whether the remedy must not be against the principal.

In *Gawdy's* case, (3 *Dyer* 278,) the Duke of Norfolk, being marshal of England, and having liberty to make a deputy, granted the office to *Gawdy for life*. An action was brought against him for suffering a defendant to go at large. One point debated was, whether *Gawdy* should be chargeable by reason that he was not marshal, but only under-marshal. It was decided, upon great consideration, against him. The circumstance that *Gawdy* held the office for life, no doubt had its influence with the court. After this decision, in the case of *Smith* v. *Hall*, (2 *Mod.* 32,) an action for false imprisonment was brought against the sheriff's officer. A writ of *latitat* had issued and was executed. Bail had been tendered but refused. It was decided, that such action should be brought against the sheriff, and not against his deputy. It was held in *Marsh* v. *Astry*, (*Cro. Eliz.* 175,) that if the under sheriff deceitfully neglect to return a writ of summons, an action will lie against him. In 6 *Bac. Abr.* 156, 157, a note is subjoined to this case, as follows. Under-sheriffs are answerable *criminaliter*; but for breach of duty in the office of sheriff, by default of the under-sheriff, the action must be brought against the high sheriff. So that the case in the text is not law. And for this is cited *Cameron* v. *Reynolds*, (*Cow.* 403.)

In *Lacock's case* (*Latch's Rep.* 187,) it was decided, that the high sheriff only was answerable for an escape suffered by his deputy. That he is answerable in all cases in damages for the misconduct of his deputy, unless where he acts criminally. For the sheriff is the officer of the court, and the under-sheriff is not, although allowed and noticed by many statutes. It may be thought that this case is affected, or in some degree overruled by the case of *Barker* v. *Braham*, (3 *Wils.* 168,) where it was decided, that an action for false imprisonment lay as well against the attorney as against the client, the attorney having sued a *ca. sa.* illegally against the defendant, whereby she was imprisoned. It is true that the attorney is said to be the agent of the client, but he bears a peculiar relationship to him. "He is put in his place and stead to manage his matters of law." Why so? Because

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the client is presumed to be, and in fact is ignorant of matters of law. Although the client who employs the attorney is in many respects bound by his acts, yet as the attorney acts professionally, and not from the judgment or advice of his client, he should in reason be answerable for his own acts. This view of the case seems to have been taken by *Lord Mansfield* in *Cameron* v. *Reynolds*, decided a short time afterwards. He says, for every breach of duty in the office of sheriff, the action must be brought against the high sheriff, as for an act done by him; and if it proceeds from the default of the under-sheriff or bailiff, that is a matter to be settled between them and the high sheriff. It may be added that *Lacock's case* is spoken of by *Buller* in *Woodgate* v. *Knatchbull*, with approbation. It is true, the jailer, who is the sheriff's officer, is liable for an escape; but he is made so by the statutes 18 *Ed. I. c.* 11, and 1 *Ric. II. c.* 7. (*Hardress* 33. 3 *Bl. Com.* 165.)

Although the English authorities may not be uniform on this subject, yet I think the weight of them is opposed to an action against the deputy for a breach of official duty. Nor do the American authorities chime on this subject. It is laid down in *Draper* v. *Arnold*, (12 *Mass. Rep.* 449,) that for a neglect of duty, an action will lie either against the principal or against the deputy. In *McIntyre* v. *Trumbull*, (7 *Johns.* 35,) it is laid down, that the sheriff shall be liable for his deputy in taking unlawful fees, although the latter may be liable *criminaliter*. In *Owens* v. *Gatewood*, (4 *Bibb* 494,) it is decided, that an action will not lie against a deputy sheriff for a breach of official duty. It must be brought against the principal, although it be for the default of the deputy. The authority of a case reported in 1 *Was. Rep.* 159, may be adduced in support of the same proposition.

However, I am not aware that *Lacock's case*, or the case of *Cameron* v. *Reynolds* have been overruled. In both cases the plaintiffs were nonsuited, because the suits were brought against the under-sheriffs.

In the present case, the act complained of was an official act. The writ of execution was issued by the de-

fendant, the deputy clerk, by virtue of the authority given to him by the clerk. Had he acted without such authority the act would have been a criminal one, but acting under such authority, the act when done became the act of the principal and not of the deputy; as much so, as if he had properly authorized him to convey a tract of land. When the conveyance was executed, although executed by the agent, it became the act and deed of the principal. So when the deputy signed the name of the clerk to the execution, it must be taken to be the act of the clerk, and that it was done by his direction and authority.

The clerk is placed in office by authority of law. He gives security for the faithful discharge of the duties of his office. The law permits him to have a deputy, but the deputy is placed there by the act of the principal, not by the law. It is not to be presumed, that the deputy is as well qualified as the principal. He is probably in his noviciate. Neither policy nor justice requires to make him answer for delinquencies, proceeding probably from his igorance and his principal's negligence. I think judgment should be entered for the defendant.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem. of* ANN CLOUD v. JAMES WEBB and WILLIAM MILLER.

Where four sisters were seised of a tract of land in coparcenary, and three of them, who were sole and of full age, conveyed their shares in fee, and the fourth who was *covert*, and an infant, joined with her husband in a deed conveying to the same vendee all their interest in the land, to which the *feme* was not privately examined, and the vendee remained in possession of the whole tract and enjoyed all the rents and profits, without claim or demand, forty years, to the husband's death, and fifteen years after his death, it was held, that admitting the deed of the *feme covert* to be the color of title, the vendee and the *feme covert* were tenants in common, and that his possession was not adverse to her.

EJECTMENT, tried before his Honor Judge MARTIN, at Orange, on the spring circuit of 1829. On the trial

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the case was, that *Samuel Mooney* died intestate in the year 1767, seised in fee of the lands described in the plaintiff's declaration, leaving two sons and four daughters. Both of the sons died seised, and intestate and without issue, whereupon the lands descended upon the four sisters, of which the lessor of the plaintiff was one. In the year 1771 the three sisters of the lessor of the plaintiff conveyed all their estate in the premises to one *Robert Neal*. In the year 1772 the lessor of the plaintiff, having intermarried with *Daniel Cloud*, and being under the age of twenty one years, jointly with her husband executed a deed conveying all their interest in the premises to the said *Neal*, but the lessor of the plaintiff was not privately examined touching her voluntary assent thereto. Under these conveyances *Neal* entered into the whole of the land, and remained in possession until his death in the year 1784, when the lands descended to his son *Henry Neal*, who in the year 1824 by deed of bargain and sale conveyed the land to one *Hinton*, who in 1826 by deed of bargain and sale conveyed the same to the defendants; but *Neal* continued in possession until his death in the year 1826. *Daniel Cloud* died in 1812. From the year 1772 until the year 1827, the defendants and those under whom they claim, enjoyed all the rents and profits without any demand for an account, and no claim to the premises was made by the lessor of the plaintiff until the year 1827, except an ineffectual attempt in the year 1805, to obtain a partition of the lands, by petition filed by *Cloud* and wife against *Henry Neal* in the County Court. Between the year 1814 and the year 1824, *Henry Neal* executed conveyances for parts of the land to different persons, but remained in uninterrupted possession, and before the year 1824 had taken reconveyances of the whole to himself. His widow remained upon the premises until possession was taken by the defendants.

MARTIN, Judge, instructed the jury, 1st. That the deed of *Daniel Cloud* and wife was color of title.

2d. That if the defendants were in the actual adverse possession for seven years after the death of *Daniel Cloud*,

the statute of limitations was a bar to the plaintiff's right.

A verdict was returned for the defendants, and the lessor of the plaintiff appealed.

Winston, with whom was *Gaston*, for the plaintiff.—The second section of the act of 1715, c. 2, relates to possession without title, acquired before the act; though its operation upon the facts of this case would be the same with that of the third section, for the owner of lands cannot enter upon, nor make claim to them, unless he be out of possession.

The possession of one tenant in common is the possession of his companions: his sole actual possession and taking all the profits is not an ouster of them. (*Co. Lit.* 199, *b. Fairclaim ex dem. Empson* v. *Shackleton*, 5 *Bur.* 2604. 2 *Ld. Ray.* 829. 6 *Mod.* 44. 7 *T. R.* 386. *McClung* v. *Ross*, 5 *Wheat.* 116.) Nor is the entry of one tenant in common claiming the premises as his in severalty, and to hold adversely to all persons, an ouster of his companions. (*Smales* v. *Dale*, *Hob.* 120. 3 *Murph.* 164.) Even a fine levied by such tenant is not an ouster of his companions, (*Ford* v. *Ld. Grey*, 6 *Mod.* 44,) though the fine be levied before they have ever actually been upon the land. (1 *East.* 568.)

There are some cases and *dicta* in the books contradicting these positions. In the case of the *Earl of Sussex* v. *Temple*, *Ld. C. J. Holt* is reported to have said, that the sole possession and taking all the profits by one tenant in common, will oust his companions; this is a mere *dictum* of that learned judge, and the contrary thereof was adjudged by him and all the other judges of King's Bench, a short time afterwards, (2 *Ld. Ray.* 829, before cited,) without taking any notice of that *dictum*. No notice is taken of it in *Ford* v. *Ld. Grey*, (6 *Mod.* 44,) which was adjudged in the King's Bench, (2 *Anne*,) *Ld. Holt* still presiding there; so that it is probable his lordship was misreported in *Ld. Sussex* v. *Temple*. In the case of *Doe ex dem. Murphey* v. *Burton*, (*N. C. T. R.* 259,) the court understood the law to be as it is supposed to be laid down by *Holt*, in *Ld. Sussex* v. *Temple*; but there

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the lessors of the plaintiff had conveyed all their estate previously to bringing the action, and even if their deeds had not operated to convey the title in severalty to those under whom the defendants claimed, they would have operated as an estoppel to the lessors of the plaintiff. If that case were decided upon the ground of adverse possession of one tenant in common to the others, I conceive that it is expressly overruled by the succeeding case of *Doe ex dem. Midford* v. *Hardison*, (3 *Murph.* 164.) In the case of *Doe* v. *Prosser*, (*Cow.* 217,) it was decided, that after thirty six years undisturbed possession, and perception of all the profits by one tenant in common without any demand by his co-tenant, the jury might presume an ouster, a partition, a conveyance, or any thing, (*vide the opinion of Willes,*) to make that possession *adverse*, so that the statute of limitations might run upon it, if it was considered wrongful; or the title in severalty might be taken to have been vested in the defendant by some lawful conveyance. This presumption is made without any reference to, and is not founded on any analogy to any statute of limitation. Upon the same ground, a grant from the sovereign, a common recovery, a release of an equity of redemption, the payment of a bond, are presumed. That the presumption in these cases is independent of the statutes of limitation, is shown conclusively by this; the same number of years founds the presumption in our courts and those of England, tho' the statutes of limitation of the two countries prescribe such widely different periods for making claim or entry, and bringing actions.

But the *dicta* of *Ld. Mansfield*, in *Doe* v. *Prosser*, (not at all necessary to the decision of that case,) have been adopted by subsequent English judges, and are undoubtedly now the law of that country. Are they to be regarded as rules of decision here? Supposing this court willing to review their judgment in *Doe ex dem. Midford* v. *Hardison*, let us enquire if *Ld. Mansfield's* opinion can be reconciled with the acknowledged principles of our law.

The law adjudges every man to be seised or possessed of land according to his title, not regarding any claim

he may make to be otherwise seised, either at the time of entering or during the continuance of his possession. If he enter "where his entry is not congeable," he is seised in fee, though he may *claim* an estate for life or a term of years only; if his entry be congeable, his seisin or possession is co-extensive with the estate or interest, by virtue of which he hath right to enter. There is an apparent exception to this rule, to-wit: where one having a right to lands, which can be enforced by action only, not by entry, accepts a conveyance of the same lands from the wrongful possessor and enters, he is seised only of that estate which passed by the conveyance, a tortious and defeasible estate; and is not remitted to his ancient and better estate, because by his own act, he has interposed an obstacle to the investigation of the title, thereby adding to that obscurity and uncertainty, on account of which, the law had forbid him to assert his right by an act *in pais*, but enjoined him to apply for remedy to a court of justice. *It is a punishment of his folly*; but if his entry be not taken away, he *is* remitted. *Smales* v. *Dale*, *Doe ex dem. Midford* v. *Hardison*, *Ford* v. *Ld. Grey*, & *Peaceable* v. *Read*, (1 *East.* 568, are striking instances of the truth of this position; in the first two, the defendants at the time of entering claimed estates in severalty, and declared that they entered in assertion and maintenance of such estates; they insisted upon making themselves wrong-doers; but they were *adjudged* to be seised according to their right and contrary to their claim. In the two last, they claimed in a *court of record* to be seised of tortious estates; notwithstanding that and the powerful operation of a fine to divest estates, (for a fine is called a feoffment of record, having for that purpose much the same efficacy as a feoffment,) yet as the *land itself was not actually transferred from the possession of the conusor to the possession of the conusee, the latter having always continued upon it*, the tenancy in common was not disturbed.

Where a man has an election of two estates, he shall be deprived of his election if it would divest any estate in remainder; and though at the time of entry he

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claim that estate which is inconsistent with the estate in remainder, the law adjudges him to be seised of the estate which will support the remainder. (*Co. Litt.* 357, *a note*. *Wood* v. *Shirby*, *Cro. Jac.* 488. *Duncombe* v. *Wingfield*, *Hob.* 254.) The husband of a coparcener enfeoffs A and his heirs and dies; A conveys her an estate for life: she enters claiming to be seised by such conveyance: she is remitted to her ancient and better estate, because "such claim is nothing to the purpose." (*Litt. sec.* 695.) There can be no adverse possession to the true owner without a disseisin. *Littleton* defines a disseisin to be "where a man entereth into lands and tenements where his entry is not congeable, and putteth out him who hath the freehold." (*Sec.* 279.) In *Collier & Wife* v. *Poe*, (*Dev. Eq. Ca.* 55,) this court held, that the defendant could not by his denial of the title of the plaintiffs, and his claim of an absolute beneficial property in himself, alter the relation existing between him and the plaintiffs, arising from his possession of the subject of the controversy. If lessee for years bargain and sell the premises to the bargainee, and his heirs and the bargainee enter by virtue of such conveyance, he is possessed of the term as the tenant of the reversioner. If the tenant disclaim in a court of record to hold of his lord, he forfeits his estate, because he has grossly violated his duty; but the estate of the reversioner is not divested, because there has been no "entry where his entry was not congeable, and turning out him who hath the freehold," and this forfeiture may be waived, and then the relation between the tenant and his lord is restored.

The reason why a feoffment by lessee for years, divests the estate in reversion, is this: a feoffment operates by *delivery* of the *land* to the feoffee, and the estate attaches to the land as incident thereto. The delivery of the *land* by tenant for years, he not being seised thereof but having only a right of possession, is an *expulsion* of the reversioner; the tenant usurps the seisin of his lord, and a forcible turning out includes a tortious entry.

By the law of nature, a man had a property in moveable things, which he had shown an unequivocal inten-

tion to appropriate to his own use, while they remained in his actual presence, and in the land upon which he stood, of which he could not be deprived without injustice. When men had resolved upon the institution of permanent property, that institution was rendered effectual for the purposes for which it was adopted, by the establishment of this rule, that the possession of the proprietor should continue, whatever distance might intervene between him and his goods, whether moveable or immoveable, until some other person acquired actual possession *in manu* or *sub pede*, under a title inconsistent with his, and exercised a dominion over them conflicting with the dominion of the proprietor. If the possesssion of this other person be consistent with the title of the proprietor, the possession of the latter is so far from being disturbed, that it is fortified and secured. In conformity with this principle, the possession of the lessee is said to be the possession of the lessor, because it stands with his title; so of bailor and bailee. Upon the same principle, the possession of one tenant in common is in *affirmance* of the title of his companions; *it is consistent therewith.* And as it is the duty of the lessee to maintain the seisin of the lessor, arising from the relation between them, as persons having mutual interests in the same subject; so tenants in common having interests so inseparably connected, that the interest of one cannot be injured or endangered, without the like injury or danger to all, it is both the right and the duty of any one who happens to be upon the land, to defend it against all aggression; their connexion is so intimate, that the one receiving the profits of the land is accountable to his companions for their share, not as a trespasser or an officious intermeddler, but as their bailiff; he is not only in the nature of a trustee to maintain their common title, but a trustee to receive the profits for them. No act of a tenant, while he continues tenant, is permitted by the law to dissolve the connexion between him and his lord, except at the option of the latter; no act of a tenant in common can sever his possession from that of his companions, while the estate in common has existence. *Lord*

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Mansfield admits this, saying, "one tenant in common, *qua* tenant in common, cannot hold adversely to the others." An estate in severalty is turned to a right by a man's "entering into lands or tenements, where his entry is not congeable, and turning out him who hath the freehold" (*Litt. sect.* 279.) Is there any peculiar infirmity in the constitution of estates held in common, which makes them more easy of destruction, capable of being divested by slighter and more equivocal acts than estates held in severalty? If there be such infirmity, from what does it arise? From the relation existing between them as persons having a community of interests and a community of rights? Because the possession of one is the possession of all? Or, because each is bound to possess the shares of his companions, and receive the profits in trust for them? It has never been supposed that words or an omission to perform a duty, could make a disseisin of an estate in severalty. If a tenant refuse to pay rent and deny his landlord's title, this is no ouster; nor is a refusal of a bailiff to account with his master. No act can have that effect, however fraudulent and dishonest, however contrary to the requisitions of law and the dictates of conscience, which doth not contain in itself actual or implied force. It must be a wrongful entry and a turning out of him who hath right; words cannot make a trespass, nor can a refusal to pay a debt; can there be a disseisin where there is no trespass?

But admitting the law to be as it was laid down by *Lord Mansfield* in *Doe* v. *Prosser*, the lessor of the plaintiff is entitled to recover; nothing less than an express refusal to account for the profits upon demand made, accompanied by a direct denial of the co-tenant's title, will amount to an ouster; an ouster cannot be inferred from sole possession and taking all the profits. (11 *East.* 49.)

Secondly, if there be adverse possession, the defendants and those under whom they claim, had no colour of title to the share of the lessor of the plaintiff, for more than seven years before the bringing of this action. The deed from *Daniel Cloud* to *Robert Neal* recites, that the premises are the fee and inheritance of his wife. In *Doe*

ex dem. Tate's heirs v. *Southard*, (3 *Hawks* 119,) Judge HENDERSON defines colour of title to be "a writing upon its face professing to pass title, but which does not do it, either from the want of title in the person making it, or the defective mode of conveyance that is used, and it must not be so plainly and obviously defective, that no man of ordinary capacity could be misled by it." If there be any rule of our law known to every man of ordinary capacity, it is that a husband can convey no greater estate than for his own life, in lands which are the inheritance of his wife. It was held, in *Hill* v. *Wilson*, (2 *Murph.* 14,) that a deed made by one as the attorney of another, he having in truth no authority from that other to convey lands, was colour of title; but the deed recited, that the person executing it had power and authority to convey in the name of him whose attorney he professed to be; and the court looks no farther than the writing to determine whether it be colour of title; any information obtained from extrinsic sources has no bearing upon that question. It is immaterial that the possessor knew at the time of taking possession, that the land belonged to another person. (*Doe on dem. of Riddick et ux.* v. *Legget*, 3 *Murph.* 539.)

Badger, contra.

HALL, Judge, after stating the case proceeded:

Is the deed of a *feme covert*, without a private examination, colour of title, where her coverture appears upon its face? *Qu.*

It must be admitted, that *Robert Neal* and *Henry Neal* have been in possession of the land from the year 1772 until year 1826, under a valid title from the three sisters of *Ann Cloud*, and perhaps a color of title from *Ann Cloud* herself. But it does not follow, that their possession has been adverse to *Ann Cloud* since her discoverture.

All the title *Daniel Cloud* had in the land, and no more, was by him conveyed to *Robert Neal*; the residue of the estate was in *Ann*, his wife, her deed being inoperative on account of her coverture and infancy. Admitting that deed to be color of title, nothing passed thereby. It could only *as colour of title* give efficacy to an *adverse* possession of seven years. It is therefore all-important to ascertain, whether in this case there has been a possession adverse to the title of the lessor of the plaintiff.

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When *Daniel Cloud* died, how did the rights of the parties stand? *Henry Neal* was in possession of the land, and had title to three fourths of it, claiming from *Ann Cloud's* three sisters. *Ann Cloud* had title to one fourth of it, but was not in actual possession. She and *Henry Neal* then, were tenants in common; therefore his possession was her possession. I need not cite authorities to show, that the possession of one tenant in common is the possession of the other. It is for that reason, that the judges have had recourse to ousters by presumption, as in the case of *Fishar* v. *Prosser* (*Cowp.* 217). There the statute of limitation would have been a bar; but *Lord Mansfield* considered the possession of one tenant in common to be the possession of the other, and therefore the statute of limitation did not run. But as there had been a possession of thirty six years, he said an ouster might be presumed from that length of time, and that the statute would run upon a presumed ouster, although in point of fact, it was admitted that no ouster had ever happened.

The possession of one tenant in common is the possession of the other.

It is a question on which the profession has been much divided, whether an actual adverse possession for seven years, unattended by color of title, was not a bar. That question does not now arise. But it will simplify the the case, to consider it unincumbered by a color of title, merely upon the defendant's possession; because it is the possession, and not the color of title, which grows and ripens into a good title. Then upon the death of *Daniel Cloud*, the deed as to his wife being a nullity, she had a right of entry, because she had a right of entry in the year 1771, which was preserved by her intermediate coverture. (*Zouch* v. *Parsons*, 3 *Burr.* 1805.) Upon the death of her husband in 1812, she was entitled to one fourth part of the land, as one of the heirs at law of her brother *James*. *Henry Neal* was at the same time, entitled to three fourths of the land, claiming under the other heirs of *James*. It follows that *Henry Neal* and *Ann Cloud* were, in 1812, tenants in common of the land in question, and that *Henry Neal*, as such tenant, remained in po ssession from that time, un-

til the year 1826. I think no doubt can be entertained, that his possession was the possession of *Ann Cloud*. Of course, it was not *adverse* to her claim; and as it was not adverse, it is not a bar, even admitting the deed executed by her to be color of title. Therefore, although there has been color of title, and a possession of more than seven years in *Neal*, and those claiming under him, as that possession was not adverse, the plaintiff's title is not barred. I think that the case is not affected by the conveyances made by *Henry Neal*; possession did not follow them.

PER CURIAM.—JUDGMENT REVERSED.

WILLIAM SPEIGHT v. WILLIAM WOOTEN.

Under the act of 1822 (*Rev. c.* 1131) for the relief of insolvent debtors, the sickness of the surety is no excuse for the default of the principal.

The plaintiff had recovered a judgment in the County Court of Wayne, against one *Stancil*, upon which a *ca. sa.* issued. The defendant, under the act of 1822 (*Rev. c.* 1131,) became the surety of *Stancil* for his appearance at the County Court, for the purpose of taking the insolvent debtor's oath. *Stancil* made default, and a judgment was rendered on the bond against him and the defendant, for the amount of the debt. Afterwards the defendant sued out writs of *supersedeas* and *certiorari*, and stated in his affidavit to procure them, that after the execution of the bond, and before the return day of the *ca. sa.* he, the defendant, was taken dangerously sick, and for that reason was unable to attend at the court and surrender *Stancil*. At the return of the *certiorari*, before his Honor Judge MARTIN, on the last circuit, the writ was dismissed on the motion of the plaintiff, and judgment being rendered upon the bond given by the defendant under the act of 1810, upon suing out the writ, he appealed.

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Henry and *Badger*, for the defendant.

Mordecai, for the plaintiff.

RUFFIN, Judge.—The counsel for the defendants properly yield, that the judgment of the County Court was right, and that the sickness of the surety was no sufficient ground for relief against that judgment. He bound himself for the appearance of the principal debtor. It is indeed his privilege to compel that appearance, if not voluntarily made. But that is between him and his principal; and if he cannot, either by reason of his own illness, or the absconding or other fraud of the principal, the surety must submit to pay the debt.

A summary judgment is properly rendered upon a bond given under the act of 1810, (*Rev.* c. 793,) upon suing out a *certiorari*.

It is however objected, that there was error in the Superior Court in giving a summary judgment on the bond given for the *certiorari*. The act of 1810 (*Rev.* c. 793) is not entirely perspicuous on this point; but the nature of the subject, as well as the words used, strongly incline us to the opinion, that the bond is not only to be taken, but proceeded on "in the same manner, and under the same regulations," as those given upon appeals. The *certiorari* is of the nature, and in the place of the appeal; the bond is to be transmitted with the record; and a new judgment against the principal is in each case pronounced in the Superior Court. Why send the bond to the Superior Court, if it is not to be acted on there? Why put the parties to a new suit, when the plaintiff's demand has been finally and judicially ascertained, and the surety cannot discharge himself but by paying the debt? This view is confirmed by the general practice under the act for twenty years; during which period, with few exceptions, all the judges have given judgments on motion.

PER CURIAM.—JUDGMENT AFFIRMED.

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THE STATE v. MARTIN.

In an indictment under the act of 1823, (*Tay. Rev. c.* 1229,) "declaring the punishment of persons of color in certain cases," it is necessary to charge that the assault was made with an intent to commit a rape. An allegation that the defendant feloniously attempted to ravish is insufficient.

The prisoner was tried on the last circuit, at Hyde, before his Honor Judge MARTIN, upon the following indictment:

"The jurors for the state, upon their oath present, that *Martin*, a "slave, &c. not having, &c. but being moved, &c. on &c. with force "arms at &c. in and upon one S. H. a white female, in the peace &c. "violently and feloniously did make an assault, and her the said S. H. "forcibly and against the will of her the said S. H. then and there "did feloniously attempt to ravish and carnally know; against the "form, &c."

After a verdict for the prosecution, his Honor arrested the judgment, and Mr. *Solicitor Miller*, on behalf of the state, appealed.

The *Attorney General*, for the state.

No counsel appeared for the prisoner.

RUFFIN, Judge.—The *Attorney General* admits in the argument, that the guilty will, with which the assault was made, is a necessary allegation in the indictment. But it is contended, that it is sufficiently expressed by "then and there feloniously did attempt to ravish," following the charge of the assault. The statute makes it a capital felony, for any person of color to *make an assault with intent to commit a rape* upon the body of a white female. Though in some minor offences the guilty will (which in all cases is necessary to constitute a crime) is implied from the wrongful overt act, and therefore need not be stated in the indictment; and in other cases the allegation of such criminal purpose, though required in the frame of the indictment, is formal so far as respects the finding of that purpose as a fact by the jury, because the law would *prima facie* infer it from the act of which it prompted the perpetration; yet generally, even at common law, the intent constituting an act a ca-

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pital crime must be precisely and specifically alleged. This rule is exemplified by the words of art, *felonice*, *burglariter*, and the like. Much more is that the case, when the indictment is founded on a statute. The terms used by the statute are then necessary in the indictment, not only to denote the disposition of the accused, but also to describe and identify the crime, as that for which the particular punishment is prescribed. This may be a good reason, why courts should not allow the sufficiency of any other epithet, though equipollent in common parlance. The term *wilful*, for example, is indispensable in an indictment for perjury under the statute of *Elizabeth*, and cannot be supplied by any other. It is a safe rule therefore to follow the words of the statute; and because it is safe, the courts have adopted it. If one departure be allowed, it cannot be told how far astray it may lead us. But independent of that consideration, it is the duty of the court to require all pleadings to be expressed in terms as brief and apt as possible. There can be none to denote the intent more apt than that word *intent* itself. It is the language of the common law, of statutes, of pleading. It is perfectly understood, and ought to be retained. It is said by *Lord Ellenborough* in *Rex* v. *Phillips*, (6 *East* 472,) to be the proper word to convey the specific allegation of intent. It is found in all the precedents within our reach; and there is no other term so expressive and precise. Here the word *attempt* has been used in its stead. We should be justified in rejecting it upon the sole ground, that it is not the word of the statute. But it is not even synonymous. *Intent* referred to an act denotes a state of the mind with which the act is done. *Attempt* is expressive rather of a moving towards doing the thing, than of the purpose itself. An *attempt* is an overt act itself. An assault is an "attempt to strike," and is very different from a mere intent to strike. The statute makes a particular intent, evinced by a particular act, the crime. That purpose and that act cannot be so well nor sufficiently described, as by the words of the statute itself.

PER CURIAM.—JUDGMENT AFFIRMED.

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THE STATE v. WILLIAM ALDRIDGE & CELIA POOL.

Under the act of 1805, (*Rev. c.* 684,) an indictment must charge that the man and woman had not intermarried.

The defendants were convicted on the last fall circuit, at Lenoir, before his Honor Judge DONNELL, under the act of 1805, (*Rev. c.* 684,) to prevent vice and immorality. The indictment was in the following words: "The jurors "&c. that W. A. late &c. unlawfully did take into his "house one C. P. and they did then and there have one "one or more children without parting &c. contrary &c." After the verdict, the counsel for the defendant moved in arrest of judgment, which motion being granted, Mr. Solicitor *Miller*, for the state, appealed.

The *Attorney General*, for the state.

No counsel appeared for the defendant.

RUFFIN, Judge.—Every indictment must allege every fact which enters into the constitution of a crime, and must also describe it either by way of specific allegation or conclusion, as some crime known to the law. The general and large term "unlawfully" is too indefinite to satisfy the court, unless it be used descriptively in a statute. (*Hawk. b.* 2, *c.* 25, *s.* 96). That epithet in the indictment is therefore insufficient. The charge is then one of a man and woman bedding and cohabiting together in his house, without an allegation that they had not intermarried, and without applying to such cohabitation the epithet *adulterously*, or concluding that thereby they committed the crime of adultery. The indictment ought certainly to have alleged such facts as would conclusively show, that the cohabitation charged is the cohabitation forbidden by the statute, namely, an adulterous one; which I think can only be done by the express negative affirmation, that they thus cohabited, not being husband and wife, or not being joined together in matrimony; or perhaps, by the application of the epithet *adulterously* to it. The indictment must always contain such averments, even beyond the words of the sta-

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tute, as will bring the case within its true construction. But here the statute calls the crime adultery; which may well make that epithet necessary. But whether it be or not, this indictment is substantially defective for the want of the averments of fact already mentioned.

PER CURIAM.—JUDGMENT AFFIRMED.

THE STATE v. FRANCES SILVER.

The court, at the request of the jury, may in its discretion permit a witness who has been once examined, to be called again, at any time before the verdict is rendered, notwithstanding the witnesses were separated before their first examination, and had since had an opportunity of communicating with each other.

The defendant was indicted for murder. On the trial, at Burke, on the last circuit, before his Honor Judge DONNELL, the state's witnesses, at the request of the counsel for the prisoner, were separated. After the jury had retired and remained together all night, they returned into court and requested that some of the witnesses, who had been examined the day before, should be called again. The prisoner's counsel objected, that the witnesses had had an opportunity of communicating with each other since their examination. But the presiding judge overruled the objection, and permitted the witnesses to be again called and examined by the jury, who were instructed, that they ought to give its due weight to the circumstance, that the witnesses had been together during the night. The jury returned a verdict of guilty, and judgment of death being pronounced, the defendant appealed.

The *Attorney General*, for the State.

No counsel appeared for the defendant.

RUFFIN, Judge.—The separation of witnesses is adopted in aid of the cross examination, as a test of the truth of their testimony by its consistency or inconsistency.

It is not founded on the idea of keeping the witnesses from intercourse with each other. That would be a vain attempt. The expectation is not to prevent the fabrication of false stories; but by separate cross examinations to detect them. Testimony altogether false might be imposed upon the court as true, because delivered by two or more, trained to the same tale; or as most frequently happens, because some indubitable and undisputed truth is mingled with much or material falsehood. The great safeguard against such a delusion consists in cross examination; in which a prompt succession of acute, pertinent, peremptory and sifting interrogatories, not anticipated, and for which answers have not been provided, surprises and betrays the impostor. And such a cross examination is most effectual when the witness cannot, by a knowledge of the statements of his predecessor, make his own conform to them. The thing to be avoided then is not that the witnesses should be together, but that they should be examined together. When interrogated separately, all the witnesses, constantly apprehensive of the detection of falsehood, and finding no poise or support but in the truth, are constrained to give in evidence the facts as they occurred. I find therefore nothing in the rule of law or the practice which forbids the examination of witnesses, who have been together after being sworn or even once examined. Indeed it is usual to keep them together in the same room, and after a witness has been examined to send him back, if there be an expectation that he will be called again. Had the party wished to recal such a witness, there is nothing to preclude him from doing so, at any stage when it would be competent for the party to recal any witness.

But even that is a much stronger case than the present. The order of trials necessarily imposes upon the parties the duty of making out their cases, at certain stages of the proceedings. They must close at some time; and after that they cannot be heard again. But it is entirely regular at all times for the witness to correct his own mistake, or to explain his words that have not been correctly understood. No rule can prescribe

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to the jury the duty of finding a verdict under a misapprehension. So if the jurors do not understand the words or meaning of the witness alike, it is competent and proper for them to ask for explanation, before it is too late to act on it. The judge may indeed give it from his notes; or preferring a direct appeal to the witness himself, as being the best able to repeat and explain his words, and as being again subjected to the ordeal of examination, he may, in his discretion, again place the witness before the jury. When explanations are thus demanded by the judge or jury, they must be considered as asked for the maintenance of truth, and in execution of justice. There is no apprehension of trick or imposition in such cases, as there would be were the same privilege in the party. If indeed the inquiries of the jury sought evidence that was incompetent, or to put the case made by the parties upon new points, the court would undoubtedly inform the jury of their impropriety, and interdict them. But here the re-examintion was solely to satisfy the jury of the testimony already given, and the greater detail made necessary only to produce that satisfaction. So we must consider it; for the objection is not taken to the subjects of the interrogatories, or the nature of the answers, but only that the witnesses were examined at all after having been together. In that I see nothing against either practice or principle.

PER CURIAM.—JUDGMENT AFFIRMED.

THOMAS *and* MEMUCAN FALCONER *v.* DANIEL JONES.

Where a *sci. fa.* on a judgment in detinue issued against a purchaser *pendente lite*, a plea that the defendant purchased at an execution sale against the original defendant, without averring that the title of the plaintiff, though good against the latter, is not good against his creditors, is bad.

This was a SCIRE FACIAS, reciting that the plaintiffs had recovered judgment in an action of detinue, brought

by them against one *John Holloway*, for sundry slaves; that pending the action two of the slaves came to the possesion of the defendant; and commanding him to show cause why he should not deliver the said slaves to the plaintiffs.

The defendant pleaded 1st, "That the slaves in ques-"tion were the property of one *Thomas Falconer*, and "after his death came to the possession of *John Holloway*, "his administrator; that pending the suit by the plain-"tiffs, against the said *Holloway*, *J. & H. Lyne* obtained "a judgment against *Holloway* as administrator of *Fal-"coner*, upon which an execution issued, and was levied "upon the said slaves, and that at a subsequent sheriff's "sale, one *Ann Falconer* purchased them, and after-"wards an intermarriage took place between the defen-"dant and the said *Ann*."

The second plea, after setting forth the above facts, concluded with an averment, that the judgment in favor of the plaintiffs against *Holloway* was permitted by *Holloway* to pass against him, in fraud of the creditors of his intestate.

To these pleas there was a general demurrer, which was sustained by his Honor Judge SWAIN, at Granville, on the spring circuit of 1831, and the plaintiff appealed.

Seawell, *Badger & W. H. Haywood*, for the plaintiffs, contended, that as the fraud was admitted by the demurrer, the judgment was void, being expressly within the words of the fourth section of the act of 1715 (*Rev. c. 7*) "for preventing fraudulent deeds and mortgages." (*Briley* v. *Cherry ante vol. 2, p. 6.*)

Devereux, for the defendant, admitted that the judgment, if fraudulently confessed by *Holloway*, was void against the defendant; but distinguished this case from *Briley* v. *Cherry*, and contended that advantage could not be taken of the fraud by plea to a *scire facias* on this judgment: That as long as the judgment stood unreversed, it was to all intents binding, and that the defendant could allege the fraud only in an independent action, or upon a motion to vacate the judgment. (*Mid-*

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dleton v. *Hill*, *Cro. Eliz.* 588. *Bush* v. *Gower*, *Strange* 1043. *Machin* v. *Delaval*, *Barnes' Notes* 52, 277).

Henderson, Chief-Justice.—It is not intended to impugn the general rule, that he who comes to the property in contest, from or under the defendant, *pendente lite*, is bound by the judgment; and if he does not show, that he comes in above, he shall be taken as coming in under him.

To this *sci. fa.* there are two pleas, to each of which there is a general demurrer. The first in substance is, that the defendant's wife purchased the slaves in contest, pending the suit against *John Holloway* at sheriff's sale, under an execution against the said *John*, as administrator of *Thomas Falconer* deceased, sued out at the instance of *J.* & *H. Lyne*, with an averment that the slaves were of the estate of the said *Thomas Falconer*, and that the said *John* took possession of and held them as of the estate of his intestate.

The second plea, I understand to state, in addition to the facts stated in the first, that the judgment was obtained by fraud.

I am rather inclined to think, that the first plea is bad, for want of an issuable averment, that although the title of the plaintiff might be good, as between the plaintiff and the administrator, yet it was not so as to the creditors *J.* and *H. Lyne*, to whose rights this defendant is substituted; a case which may be easily imagined. In such case, I think the general obligation of the judgment would be admitted, but at the same time avoided. I cannot believe the rule to be, that because A and B are contesting their rights to certain property, that the rights of all others are suspended, or their hands tied, so as to prevent them from exercising their rights in the usual and ordinary way; and that a reasonable assurance of satisfaction is given to the plaintiff, by making his judgment conclusive upon all who are parties, or privies in the proper sense of the word, not upon *quasi* privies also, who possess some but not all the qualities of a privy. The rule may be, and in this case, I think is

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But a plea, that the judgment was confessed to defraud the creditors of the original defendant, is good upon general demurrer.

founded, upon those qualities of a privy which the defendant in this case, without the averment before mentioned, does not possess. I think however, that the second plea is very clearly good, for neither justice nor policy requires that the rule should embrace fraudulent or covinous judgments. It is said, that the defendant is estopped from alleging the fraud, as much as the party himself. No person can be concluded by any act, not even his own, from averring a fact, which renders a thing null and void. Estoppels conclude from averments, contrary to existing causes, not those which have passed away. And if the truth could not be shown, to avoid a transaction, or rather to show it to be null, it would be the easiest thing to protect the most unlawful transaction, by recitals or acknowledgments in a deed. The reason a party to a fraudulent act cannot avoid it by showing the fraud is, because notwithstanding his fraud, it is binding on him if he be a party. It is not fraudulent, and therefore not void as to him. For a man cannot be guilty of a fraud on himself, and those who came in under him are affected in like manner. But one who comes in, not under him, but clothed also with the rights of a creditor, is not concluded. Even in cases where the party comes in entirely under another, he may make an averment which the other could not, if it goes to annul that from which it is contended the estoppel arises. A person makes a fradulent conveyance of his land; he cannot allege that it was fraudulent. Why? Because even if it is, it binds him. He afterwards conveys to another *bona fide*, that is, for value. The vendee, altho' coming in under the vendor, may aver the deed to be fraudulent. Why? Because it avoids it as to him. I have considered the demurrer although a general one, not so much as admitting the fact of fraud, as controverting the defendant's right to allege it; which is the effect of a general demurrer, where the cause of the alleged estoppel appears upon the record. I think there should be judgment for the defendant.

HALL, Judge.—I think it is not necessary in this case to raise a question on the doctrine, that the privy in es-

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tate, from a person against whom a suit is pending, and a judgment is afterwards obtained, is bound by that judgment. This is not the situation of the defendants. They deny that they claim title under *John Holloway*. If they do not, they are not subject to be called upon in this proceeding. It only professes to bring in privies under *Holloway*, or persons having no title at all. They plead that they are *bona fide* purchasers under an execution which issued against *John Holloway*, as administrator of *Thomas Falconer* deceased. Of course, they claim the property as belonging to the estate of *Thomas Falconer*. They further plead, that the judgment obtained against *John Holloway* was obtained by fraud. If this were the case, surely it ought not to be obligatory upon them. These pleas the demurrer admits. The consequence is, I think, that judgment should be entered for the defendants.

RUFFIN, Judge, dissented, but delivered no opinion.

PER CURIAM.—JUDGMENT REVERSED.

DELIA HAYWOOD v. JOEL SLEDGE.

Where personal property was levied upon by the sheriff, but not taken into his possession, and afterwards an action of detinue was commenced for the same property, against the original defendant, pending which it was sold by the sheriff, held, that the possession of the sheriff related to the levy, and therefore did not commence *pendente lite*.

This was a SCIRE FACIAS against the defendant, which set forth that the plaintiff had recovered certain negro slaves in an action of *detinue* against one *Mark Cooke*, and that pending the action, the said slaves had come into the possession of the defendant. On the fall circuit of 1831, at Wake, before his Honor Judge SWAIN, the following case agreed was submitted for the decision of the court.

The plaintiff sued out a writ in *detinue* on the 8th of August, 1825, against *Mark Cooke*, to recover certain

negro slaves. The writ was returned to August term, 1825, of Wake County Court, and at August term 1828, the plaintiff obtained a verdict and judgment. At August term, 1824, of the same County Court, the defendant recovered judgment in several actions of debt against *Cooke*. Executions tested of November term, 1824, issued upon these judgments, and on the 16th of February 1825, were levied by the sheriff on the said slaves, and the levy returned at February term of the same year. The slaves, by consent of the sheriff, remained in the possession of *Cooke*, on condition that they should be surrendered up whenever he required, and they had not been removed at the time the action of *detinue* was commenced. On the 19th of September, 1825, under a *venditioni exponas* issuing upon the judgment against *Cooke*, the slaves were sold by the sheriff to the defendant, and delivered into his possession.

Upon these facts his Honor gave judgment for the defendant, and the plaintiff appealed.

The case was submitted without argument by *Hogg*, for the plaintiff, and *Badger*, for the defendant.

HENDERSON, Chief-Justice.—I feel it a duty to myself and the profession, to revise what was said in the case of *Falconer* v. *Jones* (*ante* 334). Not that I am dissatisfied with the judgment pronounced in that case. But it may be understood from what was then said, that it is a sufficient plea to the *scire facias*, for the defendant to show, that he *may* have rights, paramount to the plaintiff and defendant in the original action, and is therefore not concluded by the judgment. I am satisfied, that it is not sufficient to show that the defendant *may* have a paramount title to the plaintiff; but he must *allege, and therefore show* if required, that his title *is* paramount. In that case therefore, it was not sufficient for *Jones* to have alleged and shown, that he was a purchaser at an execution sale *pendente lite*, but he should have gone on and shown, that the title of the plaintiff was of that character, that although good against the defendant *Holloway*, yet it was not so as to the creditors of the defend-

The case of *Falconer* v. *Jones*, (*ante* 334,) commented upon and approved by HENDERSON.

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ant's intestate, in whose right the suit was defended. That as to those creditors it was fraudulent, or otherwise defective against *them*; or rather that creditor, to whose rights he was substituted by his purchase at the sheriff's sale; as that confesses and avoids the recovery, and shows its want of obligation on him. But the decision in that case is sustained by the plea, that the judgment, endeavored to be enforced against the defendant, was *fraudulently* obtained. For it is to fair and *bona fide* judgments, and not to fraudulent ones, that the right of their enforcement against purchasers *pendente lite* is given. For no obligation, either legal or moral, withholds one from setting up his vendor's title, against him who has fraudulently combined with his vendor to weaken or destroy it, after he has conveyed the property to him. No principle of policy or convenience requires, that such judgment should conclude his rights. But the case before us does not depend on these principles. Here the defendant's possession, or rather the sheriff's, under whom he claims, commenced before the commencement of this suit. For *Cooke*, after the sheriff's levy, became his bailee at will. He had no possession as against the sheriff; and therefore the defendant did not acquire the possession after suit brought. It is connected with the sheriff's possession, which commenced by the levy; and *non constat*, that the defendant's title did not arise entirely after the levy. In that suit it was sufficient to show a title against the defendant.

The maxim *pendente lite nihil innovetur*, is not applicable to fraudulent judgments.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem.* HENRY SASSER *et al. v.* GRADY HERRING.

Where the plaintiff and defendant claimed under two different grants, the junior of which called for the line of the elder, and a line of marked trees was found, corresponding in age with the junior grant, held, that this fact was not evidence of the boundary of the elder grant.

EJECTMENT upon the several demises of *Henry Sasser* and *John Kethly*, tried before his Honor Judge STRANGE, at Wayne, on the spring circuit of 1830.

Before the jury was impanneled, the defendant produced and proved a disclaimer executed by the lessor *Kethly*, and moved the court to strike from the declaration the count upon his demise, which his Honor refused.

Upon the trial, the will of one *Richard Kethly* was offered by the plaintiff, as a link in the title, upon that count of the declaration on the demise of *John Kethly*. This was objected to by the defendant, because the probate was not properly certified, and the objection was sustained by the judge. Evidence was then offered of a descent from *Richard Kethly* to the lessor *John*, which was objected to by the defendant, because it appeared that *Richard Kethly* had published a will, by which he might have devised the land in dispute to some other person. But his Honor ruled, that he could not judicially recognize the existence of the will, unless it was produced with a proper certificate of its probate, and that in the absence of such proof, it must be taken that *Richard Kethly* died intestate.

A will cannot be offered in evidence for any purpose, without a certificate of the probate.

The principal question in the cause was the boundary between two adjoining tracts of land, one of which the defendant claimed under a grant to one *Benton*, issued in 1761—the other was claimed by the lessors of the plaintiff under a grant which issued to one *Whitfield*, in the year 1780, and which called for the line of the grant to *Benton*. A line of marked trees, corresponding in age to the date of the grant to *Benton*, was proved to exist, and the lessors of the plaintiff contended, that it was the true line of that grant. The defendant contended, that this line was marked when the grant to *Whitfield* was surveyed.

His Honor instructed the jury, that even if they were satisfied that the line of marked trees was made as the boundary of the land granted to *Whitfield*, it was a circumstance, taken in connexion with other circumstances, which they might consider in ascertaining the true line of the grant to *Benton*, in the absence of all proof that there was any dispute as to the true line of the grant.

A verdict was returned for the plaintiff, and the defendant appealed.

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W. H. Haywood, for the plaintiff.

Gaston, for the defendant.

HENDERSON, Chief-Justice.—We have in questions of boundary, given to the single declarations of a deceased individual, as to a line or corner, the weight of common reputation, and permitted such declarations to be proven; under the rule, that in questions of boundary, hearsay is evidence. Whether this is within the spirit and reason of the rule, it is now too late to inquire. It is the well established law in this state. And if the propriety of the rule was now *res integra*, perhaps the necessity of the case, arising from the situation of our country, and the want of self-evident *termini* of our lands would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity we have in this instance sacrificed the principles, upon which the rules of evidence are founded. But we have never, as far I know, permitted the declaration of the owner of the land, however ancient, to be used in behalf of those claiming under him, or even of those claiming the same land under a different title. We have also received private deeds and mesne conveyances, calling for the line of another tract, when of ancient date, so that the parties to them could not be produced, as evidence of boundary, under the idea that they are common reputation. *A fortiori* should grants from the state be admitted; for they are something more than the declaration of private individuals. They are the declarations of the public surveyor, whose duty it is to call for and survey, by old and former lines, and note them in his plot; although in practice we know, that his description is very frequently taken from the enterer. But grants are stronger evidences than deeds between individuals.

In no case is the declaration of the grantor admissible evidence for one claiming under him.

I apprehend however, that in no case, in analogy to the rule, excluding the declarations of the owner, would the deed of or even a grant to the owner, calling for the lines of another tract, be admitted in favor of one claiming under that grant or deed, or even in favor of

Neither are the calls of a grant to him though of ancient date, evidence for those claiming under him.

one claiming under another grant, calling for the lines of that made at the time, when such party to the deed or grant was owner of the other tract. But this case goes even farther than one deed calling for the lines of another tract, as pre-existing lines. For the judge instructs the jury, even if they were satisfied, that the marked line was in fact made for the grant to *Whitfield*, (that is, the junior patent, and the one under which the plaintiff claimed, and who insisted on its description as evidence,) it was a circumstance which they had a right to consider in connexion with other circumstances, in ascertaining the true line of the grant to *Benton* (that is, the defendant's,) in the absence of all proof, that there was then any dispute as to the true line of the latter grant. This is making a line where none was before, by the mere act of a party claiming it to be the true line, and making evidence for himself, more emphatically than by declaring what a thing is, which is already in existence. As to there being then no dispute about it, *this rule relates to hearsay from any one*, and excludes it, if *post litem motam*, coming *from any one*; but never lets in the declaration of the *party*, made at any time, whether *post* or *ante litem motam*.

Upon the first point to dismiss the suit, we have nothing to do. On the second, with regard to the will, the judge was clearly right, for the reasons which he gave.

PER CURIAM.—JUDGMENT AFFIRMED.